Supreme Court, U.S.
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No. 91-1813

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

R. Ernest **COHN**, D.C., D.A.B.C.O.,
Petitioner,

v.

John L. **BOND**, M.D., *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

REPLY MEMORANDUM FOR PETITIONER

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REPLY MEMORANDUM FOR PETITIONER

Respondents' Opposition Brief, filed June 12, 1992, proceeds through a series of misrepresentations to mischaracterize this case as one entirely different from that which the Fourth Circuit decided (which ironically it is, but for entirely different reasons).[1]

This Case Involves a Blanket Denial of Hospital Privileges to All Chiropractors. Respondents contend that this case lacks the "widespread importance" worthy of this Court's attention, because it "does not involve exclusion of a class of competitors, but rather one individual chiropractor." Opp. at 26. This contention does not pass the straight face test. It is belied by respondents' own description of the pretextual reasons given for the denial of petitioner's privileges application, each and every one of which would apply on its face to *any* chiropractor, not just to petitioner as an individual. Opp. at 8-10. *See also* Pet. at 6n.5.[2]

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[1]These misrepresentations begin in the second sentence, wherein respondents purport to cite relevant statutory provisions "not identified by petitioner". Opp. at 2-6. Yet petitioner cited and described every one of those statutes, and quoted the texts of the three most important. Pet. at 5n.4, 7-11, 15, 17n.9.

[2]*E.g.*, the "problem" of "efficiently evaluating the services of a Chiropractor", given the "lack of complete understanding on the part of the medical personnel as to the treatment and services rendered by a Chiropractor". JA 22-24. Respondents assert that "[t]here is evidence that many of the individuals considering petitioner's application made their determination based on factors relating specifically to petitioner and might

(footnote continued on next page)

Indeed, the record shows that another local chiropractor, Dr. Richard Cohen, D.C., was warned not to bother to apply for privileges because, in petitioner's case, the Hospital had already decided not to admit chiropractors. JA 1546-1547.

The Record Established that Petitioner was in Direct Competition with Virtually All of the Private M.D.

(footnote continued from previous page)
have decided differently regarding another chiropractor." Opp. at 7-8n.2. However, respondents cite to no such "evidence" in the Fourth Circuit Joint Appendix ("JA"), for there is none relating to the private M.D.s.

Respondents imply that petitioner as an individual may have been unwilling to comply with the provisions of N.C.G.S. § 131E-86(a) (quoted in Opp. at 4-5), which requires that a co-admitting M.D. be responsible "for the medical needs" of a patient admitted by a non-M.D. The record also rejects this contention, as petitioner always stood ready to comply with state law—indeed, one of his applications was limited to whatever hospital privileges might be allowed by state law. JA 79. Respondents' only "support" for the proposition that petitioner would not agree to any M.D. co-admittance requirement was a statement made by counsel during a deposition that the co-admitting M.D. would not himself attend the patient "for chiropractic care". Opp. at 9n.3. This is exactly what § 131E-86(a) says. Obviously the co-admitting M.D., responsible only for the patient's *medical* needs, would not perform *chiropractic* treatments for which the M.D. is not licensed.

The "problem" of M.D. co-admission was not one raised by petitioner. This was merely a forecast of what would have happened had petitioner been *granted* hospital privileges. The private M.D. respondents would thereupon have prompted a *second* antitrust suit by engaging in a group boycott, by which no staff M.D. would agree to co-admit petitioner's chiropractic patients. Indeed, had summary judgment not been granted by the courts below on antitrust immunity grounds, petitioner might have developed evidence that the private M.D. respondents had threatened to boycott the entire Hospital were a chiropractor (petitioner) to be admitted.

Respondents. Respondents now contend that "petitioner continually misrepresents" that virtually all of the individual M.D. respondents were in direct competition with petitioner and other chiropractors. Opp. at 7n.2. Once again, it is respondents who "misrepresent". Their own deposition testimony confirms that virtually all of these M.D.s see patients with lower back pain and other musculoskeletal disorders that chiropractors treat. *E.g.*, JA 293-294, 425-426, 661-674, 807-808, 924-925. As for the one example respondents give of "an ophthalmologist", Dr. Oliver, who "no doubt [has] *no* competitive relationship with petitioner", petitioner explained that both chiropractors and ophthalmologists treat patients with severe headaches, many of which are *not* due to eye strain where (if that were the cause) the proper referral would be to an ophthalmologist, but otherwise a proper referral might be to a chiropractor. JA 669-670.

This point of course relates to the Fourth Circuit's "radical extension" of the intracorporate conspiracy doctrine, to apply not only where the private M.D. staff physicians do *not* compete with the excluded hospital privileges applicant, as in *Oksanen v. Page Memorial Hospital*, 945 F.2d 696, 709 (4th Cir. 1991), but also to situations where, as here, virtually all of the respondent M.D.s *do* compete with petitioner. Pet. at 18-23. This case squarely presents the exclusion of an entire "class of competitors", and respondents cannot make it otherwise by unilaterially asserting facts contradicted by the record.

Even more disingenuously, respondents contend that the Fourth Circuit did not even "rule on the capacity for conspiracy among staff members", but instead held only that there could be no conspiracy between the Hospital and its staff M.D.s. Opp. at 23. Yet the conspiracy *among* the private M.D.s themselves was the *only* conspiracy theory in the case by the time it reached the Fourth Circuit. The Hospital had long since been dropped as a defendant, and "the Trustees (Board) are not involved in this appeal." Pet. at 5a. Elsewhere respondents themselves acknowledge this. Opp. at 11 & 12n.6.

Respondents seek to finesse the intracorporate conspiracy issue by arguing that "such a determination was not necessary to the Court's finding of State Action immunity." Opp. at 23. But this means only that *if* the private M.D. defendants *were* acting as "agents" of the Hospital, *pursuant to a "clearly articulated state policy"* that actually authorized them to conspire in their "own interests" to exclude competitors (with Board approval), *then* the Fourth Circuit need not have reached its "radical extension" of the intracorporate conspiracy doctrine. Opp. at 25. Yet on the other hand, if the private M.D. respondents were *not* acting pursuant to a clearly articulated state policy, but were instead *violating* a pro-competitive state policy regarding chiropractor access to public hospitals, then this Court *would* have to reach and decide the intracorporate conspiracy issue as an alternative basis for the Fourth Circuit's decision. It is to that primary issue—state action immunity—that we now turn.

The Fourth Circuit Did Not Merely "MisInterpret", but Deliberately Ignored, the Applicable Pro-Competitive North Carolina Chiropractor Hospital Access Statutes. In arguments never made to the District Court or to the Fourth Circuit below, respondents for the first time in their Opposition to this Petition for Certiorari attempt an elaborate argument as to how N.C.G.S. § 131E-85(a), even though it expressly covers only M.D.s, dentists, and podiatrists in granting public hospitals broad discretion to deny privileges applications, somehow includes chiropractors within that ambit of discretion. Respondents now further contend that the separate Chiropractor Public Hospital Access Statutes (N.C.G.S. §§ 90-153 & 90-157.1), as to which respondents have been silent throughout this litigation, are somehow meaningless and irrelevant. Opp. at 14-21.

Respondents' new argument that this is merely a case where the Fourth Circuit at most misinterpreted certain North Carolina statutes is rather curious, because the Fourth Circuit in its antitrust immunity discussion did not even *mention* or address these Chiropractor Hospital Access statutes, much less attempt to explain their inapplicability. The "conflict among the Circuits" thus remains that the Fourth Circuit, unlike any other, has upheld antitrust immunity where the relevant "clearly articulated state policy" is *pro*-competitive, not foreseeably *anti*competitive as in

cases like *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 40-42 (1985). Pet. at 14-17.[3]

In particular, respondents now focus on a clause in § 131E-85(a) providing that "[n]othing in this *Part* should be deemed to mandate hospitals to grant or deny to any such individuals [physicians, dentists or podiatrists] *or others* privileges to practice in hospitals, or to offer or provide any type of care." Opp. at 18 (emphasis added).[4] This "Part" means Part B ("Hospital Privileges") of Article 5 ("Hospital Licensure Act") of Chapter 131E ("Health Care Facilities and Services") of the North Carolina General Statutes. Part B in turn consists of §§ 131E-85, 131E-86, and 131E-87. This Part B does *not* include the Chiropractor Hospital Access Statutes, which are instead found in Article 8 ("Chiropractic") of Chapter 90 ("Medicine and Allied Professions").

Thus, it is immaterial that nothing in Part B of Chapter 131E requires public hospitals to grant or deny privileges to chiropractors, because that requirement is

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[3]One option for this Court would be to remand with direction that the Fourth Circuit reconsider its antitrust immunity rulings in light of N.C.G.S. §§ 90-153 & 90-157.1. But the Fourth Circuit has already had that opportunity, both in the case in chief and in denying plaintiff's petition for rehearing (Pet. at 26a), which prominently featured the point that the Fourth Circuit had ignored the Chiropractor Access Statutes in its decision, and reiterated petitioner's fundamental reliance on these statutes as discussed at length in the prior briefs and at oral argument.

[4]In their quotation of the statute respondents substituted "[provision]" for "Part".

instead found elsewhere—in §§ 90-153 and 90-157.1. However, respondents now take issue with the proposition that those statutes establish a clearly articulated state policy against the blanket denial of chiropractor privileges by public hositals. Opp. at 18-21.

Section 90-157.1 declares that "[n]o ... municipality ... nor any board administering ... health service ... shall deny [patients] ... the freedom to choose a duly licensed chiropractor as the provider of care or services...." Respondents argue that this language "does not require that hospitals admit chiropractors to their medical staffs." Perhaps respondents' reference to "medical staffs" converts their argument into a mere semantical ploy, because petitioner never sought to be admitted as an M.D., but only as a chiropractor under § 90-153 ("[a] licensed chiropractor ... may have access to and practice chiropractic in any [public] hospital ... and shall have access to diagnostic x-ray records and laboratory records relating to the chiropractor's patient"),[5] subject to the M.D. co-admittance requirement of N.C.G.S. § 131E-86(a). The combination of § 90-153 and § 90-157.1 clearly creates a legislated right of access by chiropractors and their

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[5]Petitioner's most substantial damages related to his exclusion not from *in*-patient but from *out*-patient privileges, which would include access to x-rays performed and read by the staff M.D. radiologist, and which implicates the "shall" portion of § 90-153. Pet. at 5-6n.4.

patients to public hospitals which the Fourth Circuit has now nullified.

Respondents argue against this straightforward construction of the plain language of the relevant state statutes by noting that in *Cameron v. New Hanover Memorial Hospital, Inc.*, 293 S.E.2d 901, 924 (N.C. App. 1982), a similar hospital patient access to *podiatrists* statute (N.C.G.S. § 90-202.12) was not so construed. It is easy to understand why. First, unlike chiropractors, podiatrists' hospital privileges are specifically and exclusively covered by § 131E-85(a), including the hospital board's broad discretion to grant or deny privileges. Article 12A ("Podiatrists") of Chapter 90 ("Medicine and Allied Occupations") does *not* contain a separate statute, similar to § 90-153, providing that podiatrists may practice in public hospitals. Perhaps more importantly, respondents do not mention that what *Cameron* involved, a dispute over the qualifications of certain podiatrists to perform foot surgery in a hospital, was governed by the specific provisions of another statute, N.C.G.S. § 131-126.11A. That statute, in language similar to § 131E-85(a), granted hospital boards broad discretion to grant, deny, or limit the privileges of "physicians and other [licensed] practitioners ... to practice surgery on human beings...." *Cameron*, 293 S.E.2d at 923.

At bottom, respondents' quarrel is with the North Carolina legislature whose pro-competitive and pro-chiropractor statutes, presumably enacted at the behest of chiropractors through the interplay of interest groups in the democratic process, respondents have

now succeeded in having judicially repealed. Respondents complain, for example, that petitioner's construction—that a patient "shall" have access to "a" (not any) chiropractor (§ 90-157.1), combined with a chiropractor "may" practice (§ 90-153), means that at least *some* duly licensed chiropractor must be afforded privileges at a public hospital—would in effect elevate the hospital access rights of chiropractors under these statutes above those of M.D.s under § 131E-85(a). Opp. at 14-16, 20-21. Shocking as this may seem to the medical establishment, this is exactly what the North Carolina Chiropractor Statutes have said since 1919, and in 1977 the legislature rejected an amendment that would have authorized hospitals to deny privileges to chiropractors. Pet. at 8, 10.

Omni Does Not Immunize Purely Private Antitrust Conspiracies by Persons Acting Contary to State Policy. Finally, respondents seek refuge in this Court's rejection of the " 'conspiracy' exception to the State Action immunity" in *Columbia v. Omni Outdoor Advertising, Inc.*, 111 S. Ct. 1344, 1351 (1991). Opp. at 24-25. Petitioner does not, however, rely on the "conspiracy exception" involved in *Omni*—where the government body was itself a co-conspirator with the private parties. What is alleged here is a purely private conspiracy by the respondent M.D.s to concoct a pretextual rationale (which the M.D.s knew from past experience would be perfunctorily ratified by the Board, not a party to this appeal) for excluding a class

of their competitors from their hospital.[6] Notwithstanding this Court's reiteration in *Omni* that a state cannot create Sherman Act immunity by authorizing persons to violate it, 111 S. Ct. at 1353, respondents argue that under the statutory scheme these private M.D.s were perfectly free to conspire in their own interests to violate the antitrust laws. Opp. at 25. Under some *other* statutory scheme, perhaps, but not under *this* one.

CONCLUSION

For the foregoing reasons and those stated previously, the Petition should be granted.

Respectfully submitted,

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[6]Respondents contend that the staff M.D.s' adverse recommendation was not decisive, but that the Board "considered a wide variety of [additional] factors" in denying petitioner's privileges. Opp. at 7n.2. This assertion is again contradicted by the record. JA 441, 443-444, 469.